A

DATO' HJ YUSUF KAMARI

v.

CIMB BANK BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D3-29-163-2008]
8 MAY 2009

C ***BANKRUPTCY:*** *Notice - Setting aside - Application for - Validity of bankruptcy notice - Whether service of bankruptcy notice good - Whether there were disparities in bankruptcy notice - Whether copy of judgment served on solicitors representing judgment debtor - Bankruptcy Rules 1969, rr. 66, 91, 97, 114*

D

This was the judgment debtor's (JD) appeal (encl. 11) against the decision of the senior assistant registrar dismissing the JD's application to set aside the bankruptcy notice issued against him. The validity of the bankruptcy notice was challenged on three grounds, namely (a) bad service of the bankruptcy notice which E was served at 5.50pm on 2 February 2008, Saturday which according to the JD violated r. 66 Bankruptcy Rules 1969; (b) alleged disparities in the bankruptcy notice such as different sums and dates given were wrong, confusing, inaccurate and ambiguous; (c) that the JD had not been personally served a copy of the F judgment dated 23 November 2006.

Held (dismissing encl. 11):

(1) Rule 66 makes no mention of the day of service. It only G mentioned time of service. The Rule itself also specifies that where service is effected after the cut off hours of 12 noon or half past three in the afternoon then such service 'for the purpose of computing any period of time subsequent to such service' shall be deemed to have been effected on the day H following the weekly holiday or on the following day, as the case may be. The 'cut off' hours are for the purpose of computing time and no other purpose. Rule 66 on time of service could not be read in isolation without regard to other applicable provisions, in particular rr. 91, 97 and 114. The I suggestion that service outside the hours mentioned in the rule had the effect of rendering the service as no service at all was unreasonable. Rule 66 could not be read literally. The affixing

of time of service must be for the purpose of computation of time of service and to show compliance of that relevant provision. It was not for rendering service outside the specified hours as no service at all. What was critical was whether the notice and later the petition were served at least eight days before the hearing of the petition. Undoubtedly, these documents were properly served within the time prescribed. The service of the bankruptcy notice was therefore good. Hence, the issue was not properly taken and must be disregarded. (paras 6, 7, 10 & 11)

(2) The bankruptcy notice in question was prepared in accordance with r. 91 which required Form 5 to be used. Form 5 does not require the setting out particulars or details as to how the debt is calculated. If information is provided such as the case here, such information merely served to assist the JD in understanding how the amount mentioned in the body of the notice was arrived at. What was of paramount importance was that the amount stipulated in the main part or body of the notice must accord with the terms of the judgment or order and the interest was quantified up to the date of the notice. The amount must also be due and owing at the time of the issue of the notice. The JD needed to be left in no doubt whatsoever as to the amount he needed to pay in order to avoid being found to have committed an act of bankruptcy. The amount stipulated herein was neither wrong nor confusing. The interest was calculated to the date of the notice and that was perfectly in accord with s. 3(1)(i) of the Bankruptcy Act 1967. This ground for challenge was therefore without merit. (para 15)

(3) The facts showed that a copy of the judgment was served on the solicitors representing the JD at the material time. It was the JD's submission that it was essential that service be personal before a bankruptcy notice may be issued. According to the JD, since there was no personal service the JD was unaware of the judgment and the notice must be set aside. This argument went against the whole rationale and purpose of representation by solicitors. Further, it was obvious from the judgment that it was summary judgment given after a successful O. 14 Rules of the High Court 1980 application. This ground was also bereft of merit and must be disregarded. (para 16)

Case(s) referred to:

Ghazali Mat Noor v. Southern Bank Bhd & Anor [1989] 2 CLJ 380; [1989] 1 CLJ (Rep) 35 SC ***(refd)***

In Re Chinery [1884] 12 QBD 342 ***(refd)***

Low Mun v. Chung Kiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***

Re Gan Wee Kuan, ex p Bank Bumiputra Malaysia Bhd, (Mentakab) [2002] 5 CLJ 113 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 6(2)

Bankruptcy Rules 1969, rr. 66, 91, 97, 114(2)

For the judgment creditor - CC Goh; M/s Soo Thien Ming & Nashrah
For the judgment debtor - Sakthy Vell; M/s Prasad Abraham & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Mary Lim JC:

[1] Enclosure 11 is the judgment debtor's (JD) appeal against the decision of the learned senior assistant registrar who had on 14 August 2008 dismissed the JD's application to set aside the bankruptcy notice dated 17 January 2008 issued against him. The application (encl. 5) to set aside the bankruptcy notice was supported by an affidavit affirmed by the JD on 11 February 2008 (encl 4). The judgment creditor (JC) filed two affidavits-in-reply, affirmed on 22 April 2008 and 16 June 2008 respectively (encls. 7 and 9). The JD filed an affidavit-in-reply affirmed on 22 May 2008 (encl 8).

[2] The validity of the bankruptcy notice was challenged on three grounds, namely:

a. bad service of the bankruptcy notice

b. disparities in details in the bankruptcy notice

c. non-service of the judgment dated 23 January 2006

[3] Having heard both learned counsel for the respective parties I dismissed the appeal with no order as to costs. My reasons are as follows.

[4] First, on the issue of bad service. Although initially there was dispute as to the time of service it has since been settled to be 5.50pm on 2 February 2008, which was a Saturday. According to learned counsel for the JD such service violates r. 66 Bankruptcy Rules 1969. In his interpretation, r. 66 allows service on week-days and at certain times on those week-days, that is before half-past three in the afternoon. When it comes to weekly holidays, no service is allowed on such days. However, service on days preceding weekly holidays must be conducted before 12 noon. Sundays used to be the only weekly holidays. Saturdays then could be considered as "days preceding weekly holidays" in which case service had to be effected before 12 noon. Since Saturdays are no longer working days, Saturdays must be considered weekly holidays, and according to learned counsel, no service is allowed on weekly holidays. Therefore the service on a Saturday in this case is not only bad but should be considered as no service at all. The decision in *Re Gan Wee Kuan, ex p Bank Bumiputra Malaysia Bhd, (Mentakab)* [2002] 5 CLJ 113 was relied on. I find no merit in this argument.

[5] It is only appropriate to start with r. 66 which reads as follows:

> 66. Time of day of service
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> Service shall be effected before the hour of half past three in the afternoon, except on days preceding weekly holidays when it shall be effected before the hour of 12 noon. Service effected after half past three in the afternoon on any week-day except the day preceding a weekly holiday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after 12 noon on a day preceding a weekly holiday shall for the like purpose be deemed to have been effected on the day following the weekly holiday.

[6] It is obvious that r. 66 makes no mention of the day of service. It only mentions the time of service. The rule itself also specifies that where service is effected after the 'cut-off' hours of 12 noon or half-past three in the afternoon then such service "for the purpose of computing any period of time subsequent to such service" shall be deemed to have been effected on the day following the weekly holiday or on the following day, as the case

may be. The 'cut-off' hours are for the purpose of computing time and no other purpose. To give it the meaning as suggested by learned counsel may lead to absurdity. If his argument is correct, it may mean there can never be any violation of r. 66 since this rule only prescribes the hour after which service cannot be effected. It does not prescribe the hour before which service can be effected. In which case, service after 12 noon on a Saturday is still good service before 12 noon of a Sunday or good service of a Monday and it goes on. Obviously, this cannot be the case.

[7] The upshot of all this is r. 66 on time of service cannot and must not be read in isolation without regard to other applicable provisions, in particular rr. 91, 97 and 114. It must be borne in mind that the JD was adjudged a bankrupt pursuant to the provisions governing the grant of adjudication and receiving orders made under Part I of Bankruptcy Act 1967. These provisions are technical in nature reflecting the whole process involved. At the hearing of a petition for a receiving order s. 6(2) requires the court to require proof of, *inter alia* the service of the petition before granting such an order. The proof of service relates not only to time and manner of service of the petition but also of the Bankruptcy Notice which relates to the proof of the act of bankruptcy. Section 6(2) reads:

> 6. Proceedings and order on creditor's petition
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> (1) ...
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> (2) At the hearing the court shall require proof of:
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> (a) the debt of the petitioning creditor; and
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> (b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, some one of the alleged acts of bankruptcy; and
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> (c) if the debtor does not appear, the service of the petition,
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> and if, satisfied with the proof may make a receiving order in pursuance of the petition.

[8] Under r. 91 of the Bankruptcy Rules 1969, a bankruptcy notice must be issued prior to the filing of a petition for bankruptcy. This notice must be served in accordance with r. 97. Rules 91 and 97 provide:

91. What Court to issue

(1) A bankruptcy notice shall be issued by the Court in which a bankruptcy petition against the debtor may subsequently be filed.

97. Service of notice

A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.

[9] Thereafter, r. 114(2) applies. In essence this rule requires an eight day lapse between service of the requisite documents and the day of the hearing of the petition except for the circumstances set out in the Rule. Rule 114(2) provides:

114. Proceedings on petition

(1) ...

(2) A creditor's petition shall not be heard until the expiration of eight days from the service thereof: Provided that where the act of bankruptcy alleged is that the debtor has filed a declaration of inability to pay his debts or where it is proved to the satisfaction of the Court that the debtor has absconded or in any other case for good cause shown the Court may on such terms if any as the Court may think fit to impose hear the petition at such earlier date as the Court may deem expedient.

[10] The suggestion by learned counsel that service outside the hours mentioned in the rule has the effect of rendering the service as no service at all is unreasonable. Rule 66 cannot be read literally. The affixing of time of service must be for the purpose of computation of time of service and to show compliance of that relevant provision. It is not for rendering service outside the specified hours as no service at all. To give such a meaning would allow abuse and make it quite easy for any debtor to avoid service of any requisite document.

[11] What is critical is whether the Notice and later the petition were served at least eight days before the hearing of the petition. Undoubtedly these documents were properly served within the time prescribed. The service of the bankruptcy notice was therefore good. Hence, the issue is not properly taken and must be disregarded.

[12] The second issue concerns alleged disparities in the bankruptcy notice dated 17 January 2008 (encl 3). The notice was issued pursuant to a judgment obtained on 23 January 2006 *vide* Kuala Lumpur High Court Suit No: D3-22-825-2004. In that suit, a sum of RM1,732,602.08 together with interest at 9.50% from 1 April 2005 till full settlement was awarded. In the notice the total amount of RM2,258,583.10 till 17 January 2008 which obviously comprises interest calculated to 17 January 2008 was set out in the notice. The JD alleged that the fact that there are different sums and dates is wrong, confusing, inaccurate and ambiguous. Learned counsel for the JD submitted that such defects in the notice cannot be cured. Instead the notice must be set aside.

[13] For this purpose, it is appropriate to consider s. 3(1)(i) Bankruptcy Act 1967 which states:

> A debtor commits an act of bankruptcy in each of the following cases:
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> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order (with interest quantified up to the date of the bankruptcy notice) or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained: ...

[14] There are obviously serious implications in bankruptcy proceedings because the "commission of an act of bankruptcy entails disabilities to the person who commits it" as said by the

Supreme Court in *Low Mun v. Chung Kiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC quoting Bowen LJ *In Re Chinery* [1884] 12 QBD 342 @ 346. Consequently, s. 3(1)(i) is given a strict construction. Mohd Azmi SCJ in that decision further added "As to the principle for construing bankruptcy notices, we agree with the view that since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the act of bankruptcy".

[15] The bankruptcy notice in question was prepared in accordance with r. 91 which requires Form 5 to be used. Form 5 does not require the setting out of particulars or details as to how the debt is calculated. If information is provided such as was the case here, such information merely serves to assist the JD in understanding how the amount mentioned in the body of the notice is arrived at. What is of paramount importance is that the amount stipulated in the main part or body of the notice must accord with the terms of the judgment or order and the interest is quantified up to the date of the notice. The amount must also be due and owing at the time of the issue of the notice. The JD needs to be left in no doubt whatsoever as to the amount he needs to pay in order to avoid being found to have committed an act of bankruptcy. In *Ghazali Mat Noor v. Southern Bank Bhd & Anor* [1989] 2 CLJ 380; [1989] 1 CLJ (Rep) 35 the Supreme Court held that "For a bankruptcy notice to be valid, therefore, it should state the exact amount due as at the date of the bankruptcy notice. He does not have to make any calculations or enquiries." In this case I find that the amount stipulated is neither wrong nor confusing. The interest is calculated to the date of the Notice and that is perfectly in accord with s. 3(1)(i). This ground for challenge is therefore without merit.

[16] Finally, on the issue of the JD not being personally served a copy of the judgment dated 23 November 2006. The facts show that a copy of the judgment was served on the solicitors representing the JD at the material time. Learned counsel for the JD submitted that it was essential that service be personal before a bankruptcy notice may be issued. Since there was no personal service the JD was unaware of the judgment. The notice must therefore be set aside. This argument goes against the whole

A rationale and purpose of representation by solicitors. Further it is obvious from the judgment that it was summary judgment given after a successful O. 14 Rules of the High Court 1980 application. This ground is also bereft of merit and must be disregarded.

B **[17]** In the premises encl. 11 is dismissed. Having regard to the position of the judgment debtor, I made no order as to costs.

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